80-671

NO. _____

Supreme Court, U. S.
FILED
OCT 23 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RICHARD R. NAGEOTTE AND GEORGE HOWARD PITTS, JR.,

Petitioners

vs.

COUNTY OF STAFFORD, VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Richard R. Nageotte, Pro Se
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191

and

Richard R. Nageotte, Esq.
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Petitioner
George Howard Pitts, Jr.

QUESTIONS PRESENTED

Were Petitioners denied that due process guaranteed by the Fourteenth Amendment of the Constitution of the United States when the state trial court refused to make an "in camera" inspection of written statements of the prosecuting witnesses admittedly held by the prosecution, upon the representation by the prosecuting attorney that they did not contain "exculpatory matter" after formal request by your Petitioners at trial for such "exculpatory matter" and for "in camera" inspection by the trial court?

LIST OF ALL PARTIES

There are no parties other than those named in the caption.

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IN THE

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OCTOBER TERM, 1980

RICHARD R. NAGEOTTE AND GEORGE HOWARD PITTS, JR.,

Petitioners

vs.

COUNTY OF STAFFORD, VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Richard R. Nageotte and George Pitts, the Petitioners herein, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in the above entitled case on the 25th day of August, 1980.

OPINION BELOW

The opinion found in the Order of the Supreme Court of Virginia is unrecorded and is printed in Appendix A hereto, infra, Page 1a. The Motion for the Production and Inspection of Witnesses' Statements filed in the Trial Court is printed in Exhibit A hereto, infra, Page 2a. The ruling of the Circuit Court of Stafford County, Virginia, on the Motion to produce witness statements is contained on Pages 6 thru 8 of the trial transcript and is printed in Appendix A hereto, infra, Page 6a.

JURISDICTION

The judgment of the Supreme Court of Virginia (Appendix A, infra, Page 1a) was entered on the 25th day of August, 1980. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition involves application by this Court of the Fourteenth Amendment of the Constitution of the United States.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis supplied)

STATEMENT OF CASE

As a result of a dispute between a private water and sewer company and the County of Stafford, Virginia, your Petitioners herein, together with the President of the water and sewer company, were arrested and charged with tampering with water meters in violation of Code of Virginia 1950, as amended, Section 18.2-163, and trespassing in violation of Stafford County Ordinance Section 19-20, both of which are misdemeanors.

Prior to trial, counsel for Petitioners determined that the complaining witnesses swearing out the trespassing warrants, together with other witnesses, had given written statements to the Commonwealth Attorney. When informal attempts by Petitioners to obtain the written statements given to the Commonwealth Attorney were unsuccessful, Petitioners filed a formal Motion in the Circuit Court of Stafford County requesting the witness statements pursuant to and to the extent permitted by Brady v. State of Maryland, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963).

Prior to trial of these charges on January 22, 1980, the Circuit Court of Stafford County, Virginia, overruled Petitioners' Motion for production of the written statements of the witnesses and refused to make an "in camera" inspection of the written statements as requested in the Motion. The trial court so ruled upon the grounds that the Commonwealth Attorney represented to the court that the written statements of the prosecution's witnesses did not contain exculpatory matter.

At the trial of these cases held before the Circuit Court of Stafford County, Virginia, on January 22, 1980, without a jury, the trial court acquitted the President of the private water and sewer companies of all charges and acquitted your Petitioners herein on the charge of tampering with water meters in violation of Code of Virginia 1950, as amended, Section 18.2-163, but convicted your Petitioners herein of the charge of trespassing under Stafford County Ordinance 19-20.

Upon conviction by the Circuit Court of Stafford County, Virginia, your Petitioners herein appealed the conviction to the Supreme Court of Virginia and alleged as assignment of error no. 9 that the trial court erred in refusing to provide the witness statements or to review them "in camera" to determine if they contained exculpatory material. The argument made before the Supreme Court of Virginia with respect to assignment of error no. 9 contained in Appellant's Petition for Appeal directed to the Supreme Court of Virginia raised the issue of the alleged due process violation which occurred in this case. Petitioners alleged that it is not for the prosecution to decide for the court or the defense what evidence is exculpatory. A full text of the argument concerning assignment of error no. 9 is printed in Appendix A hereto, infra, page 10a.

The Supreme Court of Virginia by its Order entered on the 25th day of August, 1980, finding no reversible error in the judgment complained of and refusing your Petitioners' Petition for Appeal affirmed the ruling of the trial court.

Having appealed the decision of the Circuit Court of Stafford County, Virginia, to the Supreme Court of Virginia, by Petition for Appeal and the Supreme Court

of Virginia having found no reversible error in the judgment complained of, your Petitioners herein have exhausted all state remedies available. This appeal results from Final Judgment of the highest court of the State of Virginia.

REASONS FOR GRANTING THE WRIT

PETITIONERS WERE DENIED DUE PROCESS AS A RESULT OF THE TRIAL COURT'S REFUSAL TO EXAMINE "IN CAMERA", OR PERMIT PETITIONERS TO EXAMINE, WRITTEN STATEMENTS PREPARED BY COMPLAINING WITNESSES WHO TESTIFIED AT TRIAL FOR THE PROSECUTION. THE TRIAL COURT'S ACTION WAS BASED SOLELY UPON THE REPRESENTATION OF THE PROSECUTING ATTORNEY THAT THE WRITTEN STATEMENTS CONTAINED NO EXCULPATORY MATERIAL. NO INDEPENDENT REVIEW OR EXAMINATION WAS MADE BY THE TRIAL COURT.

The issue upon which your Petitioners respectfully pray that their Petition for Writ of Certiorari be granted is narrow, but of fundamental importance to our system of justice. The facts in this case are undisputed. Your Petitioners filed a written motion requesting that they be permitted to review certain prosecuting witness statements for exculpatory matter, or in lieu of Petitioners' inspection, that the trial court inspect the statements for exculpatory matter. The written motion was filed under the authority of Brady v. Maryland, 373 U.S. 83, 10 L.Ed. 2d 215, 835 S.Ct. 1194 (1963). The prosecuting attorney (Commonwealth Attorney) admitted to the possession of written statements prepared by the complaining witnesses, but represented to the Court that the statements contained no exculpatory materials. Petitioners, having never seen the statements, and having no knowledge of the contents thereof, were left without recourse, except to the trial court. Petitioners requested that the court conduct an "in camera" investigation of the statements to determine if they did or did not contain exculpatory material.

The prosecuting attorney, the court and Petitioners all agreed at the trial of the case that the statements

were not required to be provided under the case of Brady v. Maryland, 373 U.S. 83 10 L.Ed. 215, 83 S.Ct. 1194 (1963), unless they contained "exculpatory matter". Solely upon the representation of the prosecuting attorney, and it would necessarily follow, under his interpretation of the definition of exculpatory material, the trial court declined to permit access to the statements or make an independent "in camera" review of the statements. The trial court in its ruling left the determination of the applicability and the enforcement of the constitutional right confirmed by this court to exist under the holding in Brady v. Maryland, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963), to the prosecution.

As this Court held in Brady v. Maryland, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963), that the defendant is entitled to exculpatory material and it cannot be withheld, irrespective of the "good faith" or "bad faith" of the prosecuting attorney.

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963) at page 87.

In Brady defense counsel requested Bobbit's extrajudicial statements. While he was provided some statements, counsel was not provided the critical statement that contained Bobbit's confession that it was he who actually committed the murder. Except for the fortuitous discovery of this evidence after trial the due process denial found to exist in Brady would have been just

as real, but would not have been corrected. Bad faith of the prosecution was not required by this Court in Brady as a condition precedent to relief. It is clear that this Court was mindful of the adversary nature of criminal proceedings. It is not likely that the prosecuting attorney's definition of "exculpatory material" will be the same as the defense attorney's definition or that they would agree as to the responsibility imposed by Brady v. Maryland, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963). This Court recognized at pages 87 and 88 the danger to our system of criminal justice when the prosecution is permitted to withhold such evidence.

> "A prosecution that withholds evidence on demand of an accused which if made available would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecution in the role of an architect of a proceeding that does not comport with standards of justice even though as in the present case his action is not "the result of guile" to use the words of the Court of Appeals. 226 Md., at 422"

It is submitted that in the instant case the court's refusal to make an "in camera" review permitted the prosecution to assume the role of "architect of the proceedings". The result was to place upon your Petitioners the burden of accepting the prosecution's concept of the architectual soundness of the criminal proceeding. It is said that "beauty is in the eyes of the beholder." An identical concept of beauty is not likely to be shared by prosecution and defense, when equated to the definition of exculpatory material in a criminal trial under the adversary system. Accordingly, the trial court

becomes the logical repository of the rights of both when these rights conflict.

It is asserted by your Petitioners herein that the trial court's refusal to make an "in camera" review of the witness statements upon request of the defendant violated the fundamental fairness required to achieve that due process guaranteed by the Fourteenth Amendment of the United States Constitution. It is submitted by your Petitioners that fundamental fairness requires at a minimum the review of this evidence by the trial court in its position as the independent arbitrator and evaluator charged with the responsibility of insuring that a fair trial results to both the prosecution and defendant in a criminal case. In the final analysis it is the trial court that is charged with the responsibility of insuring that the fundamental fairness required by the due process clause of the Constitution of the United States has been discharged. The trial court's failure in this case to examine the witness statements "in camera" when requested by the Defendant to do so was an abdication of the trial court's responsibility to insure that the Petitioners' due process rights guaranteed by the Fourteenth Amendment of the Constitution of the United States were protected.

Petitioners recognize a different standard may be necessary for different classes of evidence. State v. Cochran, 366 SW2d 360 (Mo. 1963) cert. den. 375 U.S. 981, 11 L.Ed. 2d 426, 84 S.Ct. 492 (1964). While the trial court in that case refused to make an "in camera" inspection of the police report it is submitted by petitioners that an important factual distinction exists. A police report contains information and impressions not necessarily of equal dignity to the written statement of the complaining witness. In the instant case the

statements contained the actual recorded facts of the incident written by the complaining witnesses at the time of the incident. Accordingly, the statements sought in the instant case constituted potential evidence of great weight and importance to petitioners. The importance of this evidence to petitioners was recognized by this court in Jencks v. United States, 353 U.S. 657, 1 L.Ed. 2d 1103, 77 S.Ct. 1007 (1957),

> "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory." at page 667.

It is submitted that in the instant case the holding of the Virginia Supreme Court brings that court into direct conflict with the holdings of other states which recognize the trial court's duty to conduct an "in camera" inspection upon request when the rights of the defendant require. See People v. Rosario, 9 N.Y. 2d 286, 213 N.Y.S. 2d 448, 173 N.E.2d 881 (1961), cert. den. 368 U.S. 866, 7 L.Ed. 2d 64, 82 S.Ct. 117. Daniel v. State, 118 Ga. App. 370, 163 S.E.2d 863 (1968). State v. Grunaw, 273 Minn. 314, 141 N.W.2d 815 (1966) (Applying the Jencks Rule) Re Waltreus, 62 Cal. 2d 218, 42 Cal. Rpt. 9, 397 P.2d 1001, (1962) (Applying the Jencks Rule). State v. Richards, 21 Wis. 2d 622, 191 A.2d 630 (1963).

When a state criminal procedure exists, not surprisingly, the courts have also affirmed the right of the defendant to an "in camera" inspection of witness statements to determine whether or not exculpatory material exists. In People v. Crawford, 114 Ill. App. 2d 230, 242 N,E,2d 483 (1969), the court citing Brady and Giles [Giles v. Maryland, 386 U.S. 66, 17 L.Ed. 2d 737, 87 S.Ct. 783 (1967)] , stated that such authority

is inherent with the trial court and based upon its duty to grant the accused a fair trial. See also People v. Hartgroves, 31 Ill. 2d 375, 202 NE2d 152 (1964) cert. den. 380 U.S. 961, 14 L.Ed. 2d 152, 85 S.Ct. 1104 (1965).

The holding of the Virginia Supreme Court in this case also places it in direct conflict with the interpretation by the federal courts of the requirements imposed upon the states by Brady v. Maryland, 373 U.S. 83 10 L.Ed 2d 215, 83 S.Ct. 1194 (1963). In U.S. ex rel Moore v. Powell, 336 F.Supp. 278 (DC Pa) (1972) while holding that no due process denial existed the District Court stated:

> "The relator relies on Brady v. Maryland, 373 U.S. 83, 83, S.Ct. 1194, 10 L.Ed.2d 215 (1963), in arguing that his conviction cannot stand where the prosecutor failed to disclose material under his control "which was potentially helpful to the defense." Relator takes the position that he is entitled to inspect the police detective's report upon request, no prior determination of "favorableness to the defendant" being made. The Commonwealth takes the position that its duty to disclose information in its files is limited to that which is favorable to the defendant, and it is solely in the prosecutor's discretion to make that determination."
>
> "The Commonwealth takes the position that the contents of the report are not favorable or helpful to the defendant, and, therefore, Brady does not require disclosure. We cannot agree, however, that Brady contemplated that the determination of favorableness would be left in the unreviewable discretion of the" (page 279)

"prosecutor. Brady makes it clear that "suppression by the prosecution of evidence faborable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. at 1196, 1197 (emphasis added). Clearly, the Court contemplated due process violations by failure to disclose evidence which the prosecutor believes in good faith is not favorable to the accused." (Page 280).

"Because neither Felton nor this case, as we view it, can resolve the broad constitutional questions which have been argued to us, we can expect similar litigation in the future. We think it appropriate to point out, however, that since Brady requires judicial scrutiny of prosecution evidence requested by the defendant, it would be far more sensible for the state trial judge to review the "favorableness" of the evidence when requested than to await the scrutiny of a federal judge upon collateral attack." (Page 291). (Emphasis supplied).

And the Fifth Circuit Court of Appeals in Williams v. Dutton, 400 F.2d 797 (CA5 Ga.) (1968) states:

"The Brady decision culminates a series of cases in which the Court proscribed the use by the prosecution of perjured testimony and the active suppression of exculpating or favorable evidence.[6] It is now clear that Brady imposes an affirmative duty on the prosecution to produce at the appropriate time requested evidence which is materially

favorable to the accused either as direct or impeaching evidence."

"Appellee insists that Brady is inapplicable to the present case because there has been no showing that the evidence demanded was favorable to Williams. We think, however, that due process of law cannot be sidestepped by such a facile distinction. The Brady quandary presented by this case is not new to this court. In Guerrero v. Beto,[7] the court remanded the case to the district court for a plenary hearing to determine whether the demanded evidence was favorable to the accused. In the circumstances of this case,[8] we think that the question should be determined in camera by the state courts.[9] If, after examination of the demanded evidence, the state court determines that favorable evidence "material either to guilt or to punishment" has been suppressed, then Williams must be granted a new trial.[10]"

"We realize that this requirement places an added burden on the trial court and it is with great reluctance that we impose it. However, we think that the alternative procedures for safeguarding the rights of criminal defendants are undesirable. The right of the accused to have evidence material to his defense cannot depend upon the benevolence of the prosecutor.[11] Likewise, we reject ap-" (Page 800)

"pellant Williams' contention that the prosecution's files should have been open to him. Since a criminal defendant cannot be compelled to incriminate himself,[12] discovery in a criminal

> trial must necessarily be substantially unilateral. We think that unlimited discovery of the state's files would unduly impair effective prosecution of criminal cases. On the other hand, since the investigative resources of the state are generally far superior to those of the defendant, a total exclusion of the accused from the evidence gathered by the prosecution also seems unwarranted. We therefore think that the procedure which we adopt in this case is a necessary compromise of the conflicting interests of state and accused." (Page 801) (Emphasis supplied).

Broad discretion exists in the trial court when granting or refusing a defendant's request for inspection of witness statements. However, the discretion of the trial court is subject to review by the appellate court. State v. King, 208 N.W.2d 287 (Minn. 1973). State v. Jacobs, 450 P.2d 542 (Or. 1969). It is asserted by your petitioners that the trial court in the instant case violated Petitioners' constitutional rights and therefore abused its discretion by its refusal to make an "in camera" inspection of the statements upon no other ground than the prosecution's representation that they contained no exculpatory matter. The Virginia Supreme Court by refusing Petitioners' Appeal did not exercise that supervision of the trial court's discretion which is required and exhibits the necessity for granting Petitioners' Writ of Certiorari in this case.

Petitioners concede that there is no constitutionally granted right to general discovery in a state criminal prosecution. Weatherford v. Bursey, 429 U.S. 545, 51 L.Ed. 2d 30, 97 S.Ct. 837 (1977). Petitioners seek only to avoid the constitutional denial of due process found to exist in Brady v. Maryland, 373 U.S. 83, 10 L.Ed. 2d

83 S.Ct. 1194 (1963) before it occurs. Preventive law like preventive medicine should treat and prevent infection rather than bask in the knowledge that a successful amputation has been performed. A rule of law which requires the trial court to make an "in camera" inspection of the written statements of the complaining witness in a criminal prosecution for exculpatory material upon request protects both the prosecutor and defendant. Such a rule would avoid the amputation which this court was required to make in Brady. It would lift from the prosecutor the burden of attempting to ascertain the definition of "exculpatory material" as defined by defendant or trial court.

The adoption of such a rule would also be of benefit to the government. Large numbers of Brady styled post conviction proceedings would be eliminated. As state remedies must be exhausted before petition to the federal courts judicial efficiency would be achieved at both the state and federal levels. The "in camera" review by the trial court would eliminate finding at the conclusion of the trial that evidence thought by the prosecutor not to be exculpatory at the beginning of trial was in fact exculpatory. The trial court by having the benefit of prosecuting witnesses statements prior to the witnesses testifying could be alert to discern exculpatory matter previously thought not to exist. Logic requires the adoption of such a rule and the prosecution of criminal cases would not be prejudiced by its adoption. If the witness statement contains no exculpatory material it need not be provided to the defendant. If it does contain exculpatory matter it would be required to be provided to the defendant under Brady by the prosecutor in any event.

It has now been seventeen years since this court's decision in Brady v. Maryland, 373 U.S. 83, 10 L.Ed. 215, 83 S.Ct. 1194 (1963). Much confusion and many divergent opinions have resulted from its application. It is submitted by Petitioners that the time has come to remove from the prosecution and at a minimum place with the trial court the decision as to what constitutes matter "exculpatory" to the defendant in the trial of a criminal case. The same independent review which has become the standard in "search and seizure" would substantially insure the "due process" right affirmed by this court in Brady without prejudice to the states ability to effectively prosecute criminal cases.

A Constitutionally mandated requirement of an "in camera" review under the proper circumstances would it is submitted be consistent with the concerns of Justices Harlan, Black, Clark and Stewart as expressed in Giles v. Maryland, 386 U.S. 66, 17 L.Ed. 2d 737, 87 S.Ct. 793 (1967) at page 117.

> Apart from dicta "in Brady v. Maryland, 373 *US 83, 10 L ed 2d 215, 83 S Ct 1194, the Court has never gone further.[9] Nor, in my view, does the Constitution demand more. This standard is well calculated to prevent the kinds of prosecutorial misconduct which vitiate the very basis of our adversary system, and yet to provide a firm line which halts short of broad, constitutionally required, discovery rules. It both guarantees the fundamental fairness of state criminal trials, thereby satisfying in full the requirements of the Fourteenth Amendment, and preserves intact the States' ultimate authority for the conduct of their systems of criminal justice. None of these advantages adheres to the standard suggested by my Brother Fortas. His reasoning must inevi-

tably result in the imposition upon the States through the Constitution of broad discovery rules. Those rules would entirely alter the character and balance of our present system of criminal justice."

And at the same time reach toward the high ideals expressed by Justice Fortas at page 98.

> "I do not agree that the State may be excused from its duty to disclose material facts known to it prior to trial solely because of a conclusion that they would not be admissible at trial.[1] The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment. No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses."

CONCLUSION

It is undisputed that the Commonwealth Attorney had in his possession witness statements made by the complaining witnesses in the case against your Petitioners. It is further undisputed that your Petitioners made a timely and proper request for these statements pursuant to Brady v. Maryland and that the trial court denied your Petitioners' request solely upon the representation of the Commonwealth Attorney that the witness statements did not contain exculpatory matter. The trial court did not proceed as requested by your Petitioners to conduct an "in camera" review of the witness statements to independently ascertain whether or not the witness statements contained exculpatory matters notwithstanding the representation of the Commonwealth Attorney. It is submitted by your Petitioners that due process as guaranteed to your Petitioners by the Fourteenth Amendment to the United States Constitution was denied to them by the trial court's ruling in this case.

RESPECTFULLY SUBMITTED,

RICHARD R. NAGEOTTE, PRO SE
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191

and

RICHARD R. NAGEOTTE, ESQ.
Nageotte, Borinsky & Zelnick
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Woodbridge, Virginia 22191
Counsel for Petitioner
George Howard Pitts, Jr.

APPENDIX

1. Order, Supreme Court of Virginia, dated the 25th day of August, 1980.

2. Motion for the Production and Inspection of Witness Statements filed in the Trial Court.

3. Ruling of the Trial Court denying Motion--Trial Transcript, Pages 6-8.

4. Assignment of Error No. 9 as found in Petitioners' Petition for Appeal directed to the Virginia Supreme Court.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 25th day of August, 1980.

Richard R. Nageotte and
George Pitts, Jr., Appellants,

against Record No. 800620

County of Stafford, Appellee.

From the Circuit Court of Stafford County

Finding no reversible error in the judgments complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: /S/ Richard R. Buriak

Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF STAFFORD COUNTY

COUNTY OF STAFFORD AND
COMMONWEALTH OF VIRGINIA,

Plaintiffs

vs. CRIMINAL NO. _____

RICHARD R. NAGEOTTE,
B. CALVIN BURNS, and
GEORGE PITTS,

(APPEAL FROM THE STAFFORD GENERAL DISTRICT COURT)

Defendants

NOTICE AND MOTION

TO: Daniel Chichester
Commonwealth Attorney
Stafford County Courthouse
Stafford, Virginia 22554

PLEASE TAKE NOTICE that at the regularly scheduled Motions Day for the Circuit Court of Stafford County, Virginia, on Tuesday, January 22, 1980, at 10:00 A.M., or as soon thereafter as counsel can be heard, prior to trial of the above referenced case Defendant, Richard R. Nageotte pro se, and Defendants B. Calvin Burns and George Pitts, by counsel, will move the Circuit Court of Stafford County to permit inspection and copying of any and all documentary evidence of the Commonwealth which may contain exculpatory matter beneficial to the Defendants in the trial of the above referenced cases upon the following grounds:

1. Defendants are appealing a conviction entered in the General District Court, Stafford County, Virginia, on October 26, 1979, which case has been set for trial in the Circuit Court of Stafford County for January 22, 1980.

2. Richard R. Nageotte, acting pro se, and Richard R. Nageotte acting as counsel for B. Calvin Burns and George Pitts, has heretofore requested certain documents, including statements prepared and signed by complaining witnesses and/or other witnesses in the above styled cases, which the Defendants know to be in the possession of the Commonwealth Attorney having been furnished to the Commonwealth Attorney by Mr. William Harris, the Stafford County Attorney.

3. That the Commonwealth Attorney has heretofore advised the Defendants that he would advise whether or not he would voluntarily make these statements available to the Defendants.

4. That the Defendants, through counsel, and Richard R. Nageotte, pro se, have on numerous varied occasions requested the statements from the Commonwealth Attorney.

5. That the Defendant, Richard R. Nageotte pro se, and counsel for B. Calvin Burns and George Pitts, did on January 14, 1980, request the aforesaid materials again from the Commonwealth Attorney in the office of the Commonwealth Attorney. He was advised that the Commonwealth Attorney had consulted with the County Attorney and it was his decision after such consultation with the County Attorney not to voluntarily furnish such statements to the Defendants in the above cases.

6. Your Defendants believe that they are entitled to receive these statements pursuant to the requirements of Brady v. State of Maryland, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963), and Stover v. Commonwealth of Virginia, 211 Va. 789 (1971). That the failure and refusal of the Commonwealth to provide these statements to the Defendants herein will deny to the Defendants their constitutional right of due process. A copy of the case of Brady v. State of Maryland and Stover v. Commonwealth of Virginia, is attached to this Notice and Motion for the convenience of the Court.

7. The Court is respectfully requested to order the Commonwealth to provide these materials to the Defendants prior to the trial on January 22, 1980, and to review any and all witness statements which the Commonwealth Attorney believes do not contain the matters required to be disclosed to the Defendants to meet the due process requirements of the Constitution.

/S/ Richard R. Nageotte
RICHARD R. NAGEOTTE, PRO SE

B. CALVIN BURNS AND GEORGE PITTS

/S/ Richard R. Nageotte
BY COUNSEL

/S/ Richard R. Nageotte
RICHARD R. NAGEOTTE
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Defendants

CERTIFICATE OF SERVICE

This is to certify that I have this 15th day of January, 1980, mailed, postage prepaid, a copy of the foregoing Notice and Motion to Daniel Chichester, Commonwealth Attorney, Stafford County Courthouse, Stafford, Virginia 22554, Counsel for Plaintiffs.

/S/ Richard R. Nageotte
RICHARD R. NAGEOTTE

VIRGINIA

IN THE CIRCUIT COURT OF STAFFORD COUNTY

- X

COMMONWEALTH OF VIRGINIA,

Plaintiff

-vs-

RICHARD R. NAGEOTTE,
B. CALVIN BURNS, and
GEORGE PITTS,

Defendants.

- X

Tuesday, January 22, 1980
Stafford, Virginia

Transcript

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MR. NAGEOTTE: I have just two brief preliminary matters, Your Honor. Number one, I would like to just put on the record since we didn't have a court reporter this morning, we have filed a Motion to Produce Commonwealth witnesses' statements under the case of

Brady versus Maryland and Commonwealth -- Lowe versus Commonwealth and Your Honor ruled this morning that we were not entitled to those statements by virtue of a recent Virginia case of --

THE COURT: Well, let me see what you asked for, Mr. Nageotte. Mr. Nageotte, you say you have appeared or requested certain documents. Those are specified documents?

MR. NAGEOTTE: Yes, sir, Your Honor. I asked the Commonwealth Attorney if he would voluntarily provide the written statements he had from witnesses in the case.

THE COURT: Did you ask for witness statements, generally, or did you ask for specific statements?

MR. NAGEOTTE: I asked for the specific witness statements in this case, Your Honor, who I happen to know from other depositions had been given and I asked Mr. Chichester for that. He said at first he would

have to let me know and then at a later time, which was I believe about a week ago, I went to his office again and he said that he consulted with Mr. Harris, the County Attorney, and as the result of that consultation, he felt that he could not give them to me unless I filed a Motion and I filed a Motion.

THE COURT: Was it your position that these statements would be exculpatory?

MR. NAGEOTTE: Well, the problem I have, Your Honor, is that I don't know if they would be exculpatory or not. I recognize the rule is that statements or evidence must be exculpatory or have some value to use in impeachment of the witness from the witness stand when they testify. The problem I have in this case is I really don't know whether in all honesty to the Court not having seen the statements, I don't know if they are exculpatory or not and I would suggest that perhaps the only way to handle that would be to have the Court

make an in camera review of the statements and see if they are exculpatory. Or the only alternative to that is to believe the Commonwealth Attorney that they aren't. I guess it's always been a problem of mine, how do you prove it when you don't know it.

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THE COURT: What's your position on that, Mr. Chichester?

MR. CHICHESTER: There is nothing about them that is exculatpory.

THE COURT: Gentlemen, there is a lot of recent law on this subject but if the statements are not exculpatory, I don't think the rule of Brady against Maryland governs. I am going to deny the Motion.

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RICHARD R. NAGEOTTE AND
GEORGE PITTS,

Appellants

vs.

COMMONWEALTH OF VIRGINIA

Appellees

APPELLANTS' PETITION
FOR APPEAL

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Counsel for Appellants

ARGUMENT IX

THE TRIAL COURT ERRED IN REFUSING TO PROVIDE WITNESS STATEMENTS OR TO REVIEW IN CAMERA TO DETERMINE IF THEY CONTAINED EXCULPATORY MATERIAL.

"Due process is violated upon suppression by the prosecution of evidence favorable to an accused upon request when the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83 (1963); Norris v. Slayton, 540 F.2d 1241, 1244; Lowe v. Commonwealth, 218 Va. 670 (1977). In Brady the Defendant and a companion were both found guilty of first degree murder and sentenced to death. Before Brady's trial, his counsel requested from the prosecution that he be allowed to examine certain statements made by Brady's companion. The prosecution complied with the request to some degree, but withheld one particular statement in which the companion admitted that he had actually committed the homicide. The Supreme Court not only found Brady's constitutional rights to a fair trial violated but our very system of justice jeopardized.

> "Society wins not only when the guilty are convicted but when criminal trials are fair. Our system of administration of justice suffers when any accused is treated unfairly.... A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the Defendant. That casts the prosecution into the role of an architect of a proceeding that does not comport with standards of justice..."

Defendant in Lowe was convicted of several offenses, one of which was robbery. The trial court refused his request for the names and addresses of the persons who were present at the time the alleged offense was committed. Defendant

claimed that since identification of him as one of the robbers was a material element, if any of the witnesses might testify that he was not anyone they saw involved in the robbery such testimony would be exculpatory and he should have it made available to him. This court found no Brady violation in the Lowe case because the record in no way supported Defendant's speculation. There was no evidence to suggest the police ever had witnesses' names and the prosecution had been asked to produce any exculpatory materials and there was no direct claim that the order had not been complied with. 218 Va. 678-679.

Norris v. Slayton dealt with a black prisoner convicted of rape charges. Defendant claimed exculpatory evidence had been withheld from him in the form of a laboratory report showing that no negroid or caucasian hairs were found on Defendant's or victim's respective personal effects and in a policeman's report that showed a less than positive identification of the accused by the victim within an hour after the attack. Such evidence had been withheld, the Commonwealth made the decision about what was and was not material required to be furnished by Brady and in this instance had decided the evidence did not fall into that category. While the Court stated that "the prosecution is not to decide for the Court what is admissable or for the defense what is useful, it did find that Defendant's lack of knowledge as to the lab report had not hindered his right to a fair trial. The police reports, on the other hand, had because Defendant had been prejudiced sufficiently by its being withheld. 540 F.2d 1242-43.

Not every non-disclosure of Brady material is sufficient to prejudice Defendant to the degree that a conviction must be overturned. How strong a showing of prejudice in each case will depend upon the nature of the charges, the testimony of the state and the role the undisclosed testimony would be likely to play. Barbee v. Warden, Maryland Penitentiary, 351 F.2d 842, 847 (4th Cir. 1964). The police report in Norris met these criterion. The primary issue

before the jury was the identification of Defendant. The expression of some amount of doubt on the part of the victim was in conflict with her testimony at trial that when she confronted the Defendant she was certain that he was her assailant. Such was evidence which had a direct bearing upon the critical issue in the case and "might reasonably have weakened or overcome testimony adverse to the defendant." 540 F.2d 1244.

Appellants in the case at bar recognized that there is no constitutional right to discovery in a misdemeanor case in the State of Virginia. However, where the prosecution is in possession of material which is exculpable in nature the non-disclosure of this evidence would prejudice one's rights to a fair trial. Brady applies irrespective of the crime charged. Townhouse owners (Vicki Lowder, Kikuko Armel, Piper Zimmerman, Vivian Clark) testified at trial that they had turned in written statements of the events of October 3, 1979, to the Commonwealth Attorney, Mr. Chichester (January 22, 1980, transcript, 78-79, 118-119, 141, 157). Mrs. Lowder, Mrs. Armel, Mrs. Zimmerman, Mrs. Clark and Sergeant Marron all attended a simultaneous witness interview that Mr. Chichester held to "refresh" witnesses' recollections as to the events of that day by discussing everyone's testimony to be given in General District Court. (January 22, 1980, transcript, pages 79-80, 120-121, 142-143, 158, 176-177). Only Mrs. Clark claimed that there was no discussion of other witness testimony at the meeting. (January 22, 1980, transcript, page 158). Mr. Marron directly contradicted this evidence when he testified that Mrs. Clark was present when the main points of everyones' testimony were being discussed at the meeting. (January 22, 1980, transcript, pages 176-177). There was further evidence that the townhouse residents had passed around the transcript of the General District Court proceedings and all but Sergeant Marron had examined the testimony of their

neighbors. (January 22, 1980, transcript, pages 81-82, 110-111, 144-145, 157, 166, 177-178). At the trial, there was further evidence of conflicting testimony. Sandy Lowden testified that Pitts stayed on Mrs. Lowder's property for "a couple of minutes" until the Sheriff arrested him. In General District Court she had claimed it was a matter of seconds. Mrs. Lowder resolved this discrepancy by suggesting that when she referred to seconds, she could have been talking about minutes as 60 seconds equal one minute or 120 seconds equal two minutes. (January 22, 1980, transcript, pages 94-96). Vivian Clark testified that she received the General District Court transcript from Piper Zimmerman and returned it to her (January 22, 1980, transcript, page 159). However Elizabeth Pritchard was positive that Vivian Clark had given the transcript to her (January 22, 1980, transcript, pages 166-167).

Due to the exchange of testimony and subsequent conflicts in the testimony at the Circuit Court level with that given in the General District Court, Nageotte and Pitts strongly believe and contend that the written statements of witnesses regarding the events of October 3, 1979, may well contain exculpatory material in the form of impeachment material. Armstrong v. Collier, 536 F.2d 72, 76 (5th Cir. 1976). For this reason they requested copies of the statements or in camera review of the same, Id. at 74, and also now assign as error the Court's refusal to provide either.

CERTIFICATE OF SERVICE

I, Richard R. Nageotte, a member of the Bar of the Supreme Court of the United States and counsel of record for Richard R. Nageotte and George Howard Pitts, Jr., Appellants herein, hereby certify that on the 23rd day of October, 1980, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On County of Stafford, Virginia, Appellee, herein, by depositing such copies in the United States Post Office, Woodbridge, Virginia, with first class postage prepaid, properly addressed to the post office address of Daniel Chichester, Stafford County Commonwealth Attorney, the above named County of Stafford Virginia's counsel of record, at Stafford Courthouse, Stafford, Virginia 22554.

All parties required to be served have been served.

Date October 23, 1980.

Richard R Nageotte

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and

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